No. 96-710

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

MICHAEL SULLIVAN, et al.,

Petitioners,

v.

SYLVESTER SASNETT, et al.,

Respondents,

and

UNITED STATES OF AMERICA,

Intervenor-Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

*PERCY L. JULIAN, JR.
**Counsel of Record*
STEVEN N. SCHULMAN
JULIAN & ASSOCIATES, S. C.
Post Office Box 2206
Madison, Wisconsin 53701-2206
(608) 255-6400

ATTORNEYS FOR RESPONDENTS

No. 96-710

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

MICHAEL SULLIVAN, et al.,

Petitioners,

v.

SYLVESTER SASNETT, et al.,

Respondents,

and

UNITED STATES OF AMERICA,

Intervenor-Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

---

*PERCY L. JULIAN, JR.
**Counsel of Record*
STEVEN N. SCHULMAN
JULIAN & ASSOCIATES, S. C.
Post Office Box 2206
Madison, Wisconsin 53701-2206
(608) 255-6400

ATTORNEYS FOR RESPONDENTS

QUESTION PRESENTED

Whether the Religious Freedom Restoration Act, 42 U.S.C. §§2000bb et seq., is a facially valid exercise of Congress' power under Section 5 of the Fourteenth Amendment which also does not violate the Separation of Powers Doctrine.

LIST OF PARTIES

In addition to the Petitioners, the captioned Defendants-Appellants to the proceedings below included Petitioners' "agents, assistants, officials, employees, successors and others acting in concert or cooperation with them."

In addition to the Respondents, the captioned Plaintiffs-Appellees to the proceedings below included Respondents "individually and on behalf of all others similarly situated." However, the action does not come before the Court as a certified class action.

Original Plaintiffs Will Highfill and John Casteel did not have claims under the Religious Freedom Restoration Act of 1993 and are not parties before this Court.

Each of the continuing named Respondents join this brief in opposition to the petition.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 6

I. BACKGROUND OF RFRA AND APPLICATION IN THIS CASE 7

II. THE BAN ON RELIGIOUS JEWELRY VIOLATES THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT 15

III. PETITIONERS' BAN ON RELIGIOUS JEWELRY VIOLATES THE WISCONSIN CONSTITUTION 20

IV. THE ONLY EFFECT OF GRANTING THE WRIT WILL BE TO PROTRACT THIS LITIGATION AND CAUSE UNCERTAINTY IN THE OPERATION OF THE WISCONSIN CORRECTIONAL SYSTEM 22

V. RFRA IS CONSTITUTIONAL 24

CONCLUSION 37

APPENDIX

TABLE OF AUTHORITIES

Cases Cited **Page**

Alameen v. Coughlin,
892 F.Supp. 440 (E.D.N.Y. 1995) 10, 11

Ansonia Bd. of Ed. v. Philbrook,
479 U.S. 60 (1986) 30

Blodgett v. Holden,
275 U.S. 142 (1927) 15

Campos v. Coughlin,
854 F.Supp. 194 (S.D.N.Y. 1994) 11, 18

Cantwell v. Connecticut,
310 U.S. 296 (1940) 25

Casteel v. McCaughtry,
168 Wis.2d 758, 484 N.W.2d 579 (Ct. App. 1992) 21
mod. on other grounds, 176 Wis. 2d 571,
cert. denied, 114 S.Ct. 327 (1993)

Church of the Lukumi Babalu Aye v. City of Hialeah,
508 U.S. 520, 113 S.Ct. 2217 (1993) 29, 33, 36

City of Boerne v. Flores,
117 S.Ct. 293 (Oct. 15, 1996) 6, 7, 22

City of Mobile v. Bolden,
446 U.S. 55 (1980) 28

City of Richmond v. J.A. Croson Co.,
488 U.S. 469 (1989) 28

City of Rome v. United States,
446 U.S. 156 (1980) 28

Corporation of Presiding Bishop v. Amos,
483 U.S. 327 (1987) 30

Edwards v. Aguillard,
482 U.S. 578 (1987) 31

E.E.O.C. v. Catholic Univ.,
83 F.3d 455 (D.C. Cir. 1996) 25

E.E.O.C. v. Wyoming,
460 U.S. 226 (1983) 29

Employment Div., Dept. of Human Resources v. Smith,
494 U.S. 872 (1990) 7, 20, 21, 32, 34, 36

Estate of Thornton v. Caldor, Inc.,
472 U.S. 703 (1985) 30, 31

Ex parte Virginia,
100 U.S. 339 (1880) 26

Fitzpatrick v. Bitzer,
427 U.S. 445 (1976) 25, 29, 30

Flores v. City of Boerne,
73 F.3d 1352 (5th Cir. 1996) 25, 28, 32, 37
cert. granted, 117 S.Ct. 293 (Oct. 15, 1996)

Frazee v. Ill. Dept. of Employment Security,
489 U.S. 829 (1989) 36

Fullilove v. Klutznick,
448 U.S. 448 (1980) 15, 28, 32

In re Marriage of Lange v. Lange,
175 Wis.2d 373, 502 N.W.2d 143 (Ct. App. 1993) 21
rev. denied 505 N.W.2d 137 (Wis. 1993),
cert. denied, 114 S.Ct. 1416 (1994)

Jocz v. LIRC,
196 Wis.2d 273, 538 N.W.2d 588 (Ct. App. 1995) 21

Jolly v. Coughlin,
76 F.3d 468 (2d Cir. 1996) 8, 15

Katzenbach v. Morgan,
384 U.S. 641 (1966) 26, 27, 28, 29, 32, 35

Lassiter v. Northampton County Bd of Election,
360 U.S. 45 (1959) 26

Mack v. O'Leary,
80 F.3d 1175 (7th Cir. 1996) 12, 36

Muhammad v. Lynaugh,
966 F.2d 901 (5th Cir. 1992) 10

O'Lone v. Estate of Shabazz,
482 U.S. 342 (1987) 15, 16, 17, 18, 19, 21

Oregon v. Mitchell,
400 U.S. 112 (1970) 28

Pierce v. Society of Sisters,
268 U.S. 510 (1925) 33

Sasnett v. Department of Corrections,
891 F.Supp. 1305, (W.D.Wis. 1995) 4

Sasnett v. Sullivan,
91 F.3d 1018 (7th Cir. 1996) 6, 24, 25, 27, 35, 36

Sasnett v. Sullivan,
908 F.Supp. 1429 (W.D.Wis. 1995) 5

State v. Miller,
202 Wis.2d 56, 549 N.W.2d 235 (1996) 20

State v. Miller,
196 Wis.2d 238, 538 N.W.2d 573 (Ct. App. 1995) 21

Teague v. Lane,
489 U.S. 288 (1989) 23

Trans World Airlines, Inc. v. Hardison,
432 U.S. 63 (1977) 30

Turner v. Safley,
482 U.S. 78 (1987) 15, 16, 17, 18, 19, 21

United States v. Ballard,
322 U.S. 78 (1944) 36

United States v. Gainey,
380 U.S. 63 (1965) 33

United States v. National Dairy Products Corp.,
372 U.S. 29 (1963) 25

United States v. Seeger,
380 U.S. 163 (1965) 36

Walz v. Tax Commission,
397 U.S. 664 (1970) 29, 33

Washington v. Davis,
426 U.S. 229 (1976) 28

Werner v. McCotter,
49 F.3d 1476 (10th Cir. 1995) 18

West Virginia State Bd. of Ed. v. Barnette,
319 U.S. 624 (1943) 8, 18

Williams v. Lane,
851 F.2d 867 (7th Cir. 1988),
cert. denied, 488 U.S. 1047 (1989) 17

Wisconsin v. Yoder,
406 U.S. 205 (1972) 36

Yoder v. Palmer,
177 Wis.2d 756, 502 N.W.2d 903, (Ct. App. 1993) 21

Constitutional Provisions Cited

United States Constitution, Amendment I 2, 4, 5, 7, 15, 16, 20, 25, 36

United States Constitution, Amendment XIV 2, 4, 6, 24, 25, 26, 28, 29

United States Constitution, Amendment XV 26, 28

Wisconsin Constitution, Article I, Section 18 ..... 2, 20

United States Statutes Cited

Prison Litigation Reform Act of 1996,
Pub. L. 104-134, Title VIII (18 U.S.C. §3626) 23

28 U.S.C. §1254(1) 2

42 U.S.C. §2000bb 2, 3, 4, 6, 7

42 U.S.C. §§2000bb-1(a) 8

42 U.S.C. §2000bb-1(b) 8, 36

Title VII of the Civil Rights Act of 1964,
42 U.S.C. §§2000e et seq. ..... *passim*

42 U.S.C. §2000e-2(a)(2) 30

42 U.S.C. §2000e-2(e)(j) 30

Federal and State Regulations and Administrative Rules Cited

28 C.F.R. §548.16 10

Ill. Adm. Code, Title 20, §425.90(c)(2) 10

Wis. Adm. Code §309.61(1)(a) 20

Wis. Adm. Code §DOC 309.61(2)(b) 13

Wis. Adm. Code, §DOC 309.61(6) 12

Wis. DOC 309, IMP 1 13

Wis. DOC 309, IMP 6 ..... 11, 17

Wis. DOC 309, IMP 6-A 12

Wis. DOC 309, IMP 6-B 11

Wis. DOC 309, IMP 6-F 12

Wis. DOC 309, IMP 6-G 12

Wis. DOC 309, IMP 6-H 12

Federal Rules of Civil Procedure Cited

Fed.R.Civ.Pr. 15(a) 22

Congressional Authorities Cited

139 Cong. Rec. S14350-68 (daily ed. Oct. 26, 1993) 34

139 Cong. Rec. S14461-68 (daily ed. Oct. 27, 1993) 34

139 Cong. Rec. S14468 (daily ed. Oct. 27, 1993) 8

H.R. Rep. 103-88, Religious Freedom Restoration Act
of 1993 at 6 (May 11, 1993) 35

S. Rep. 103-111, Religious Freedom Restoration Act
of 1993 at 8 (Jul. 27, 1993) 35

Other Authorities Cited

Lucy S. Dawidowicz,
The War Against the Jews, 1933-1945 (1975) 33

No. 96-710

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

MICHAEL SULLIVAN, et al.,

Petitioners,

v.

SYLVESTER SASNETT, et al.,

Respondents,

and

UNITED STATES OF AMERICA,

Intervenor-Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Sylvester Sasnett, Lonnie Smith, James Lowery, James Hadley and Barbara Miller respectfully request that the Court deny the Petition for Writ of Certiorari in the above-captioned matter.

OPINIONS BELOW

Petitioners' statement on the "Opinions Below" is complete and correct. However, the transcription of the Court of Appeals' decision in Petitioners' Appendix contains errors which are corrected in Respondents' Appendix. Resp. App. at A1-A2.[1]

JURISDICTION

The Judgment in Respondents' favor by the United States Court of Appeals for the Seventh Circuit is dated August 2, 1996. This Court's jurisdiction in this matter is discretionary under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const., Amend. I and Amend. XIV, §§1, 5, are reprinted in Resp. App. at A3. Wis. Const., Art. I, §18, is reprinted in Resp. App. at A3. The Religious Freedom Restoration Act of 1993, 42 U.S.C. §§2000bb et seq., is reprinted in Pet. App. at A91-A95.

STATEMENT OF THE CASE

In the proceedings below, the Court of Appeals upheld the District Court's injunction against Petitioners' correctional policy which barred inmate Respondents from possessing and wearing modest crosses and crucifixes for sincere religious devotional purposes. Petitioners now seek to vacate that injunction by having this Court declare unconstitutional

---

[1]Citations to Petitioners' Appendix are abbreviated "Pet. App." while references to Respondents' Appendix are "Resp. App."

on its face, an Act of Congress, the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§2000bb et seq.

Petitioners are officials and policy makers of the Wisconsin Department of Corrections (DOC). Effective June 1, 1992, the DOC's Division of Adult Institutions issued the Internal Management Procedure (IMP) which is the subject underlying this case. Pet. App. at A96-A98. Petitioners' IMPs are written policies but not promulgated rules. The IMP here banned the wearing and possession of nearly all jewelry.[2] Religious emblems were deliberately included in the ban. Pet. at 2; Pet. App. at A20-A21. Inmates already in the system were given a full year to comply with the IMP. Pet. App. at A23. An inmate's failure to comply with the ban could result in discipline. Pet. App. at A18.

Respondents Sylvester Sasnett, Lonnie Smith and Barbara Miller, Christians of various views, were forced to give up a total of three crosses and a crucifix, which is a cross with a figure of Jesus on it. Pet. App. at A25-A28. The symbols were modestly designed, made of gold, valued from $32 to $75, and were all one to two inches long. Id.

It is undisputed that Sasnett, Smith and Miller wore their crosses as an important part of their religious prayers and devotion, motivated by their sincere Christian beliefs. Pet. App. at A25-A28. It is undisputed that Sasnett, Smith and Miller are not gang members, nor

---

[2]The IMP contained significant exceptions. Inmates might possess a watch worth up to $75. Married or widowed inmates might also possess wedding rings of unlimited value, including those with stones, and married or widowed female inmates might, in addition, possess an engagement ring. Inmates were also allowed to wear medical alert bracelets or medallions, if required. Pet. App. at A96-A97. Possession of rosaries and some other religious articles were and are permitted by separate IMPs.

are they associated with gangs in any way. Id. It is undisputed that an inmate's participation in sincere religious practices and devotion is not only beneficial to the inmate but to the correctional system and society as a whole, as well. Pet. App. at A30-A31.

On December 20, 1993, Sylvester Sasnett commenced this action, pro se, in Wisconsin state court, challenging a number of Petitioners' property rules. Petitioners removed the matter to the United States District Court for the Western District of Wisconsin. The District Court, Judge Barbara B. Crabb, appointed counsel.

On August 1, 1994, Respondents filed an amended complaint adding several claims, plaintiffs and defendants. Sasnett, Smith and Miller alleged, inter alia, that their rights under the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§2000bb et seq., were violated when Petitioners deemed contraband their Christian crosses. They also asserted constitutional claims challenging the jewelry ban under the First and Fourteenth Amendments.

Petitioners moved for partial dismissal of the complaint, arguing, inter alia, that RFRA was unconstitutional. The United States then joined as Plaintiff-Intervenor. On June 26, 1995, Judge Crabb denied the motion to dismiss the RFRA claim and ruled that the statute was constitutional. Sasnett v. Department of Corrections, 891 F.Supp. 1305, 1314-21 (W.D.Wis. 1995). Pet. App. at A75-A87.

Petitioners and Respondents then filed cross-motions for summary judgment on the RFRA issue, among others. By order docketed December 4, 1995, Judge Crabb, in pertinent

part, granted Respondents' motion and denied that of Petitioners. Sasnett v. Sullivan, 908 F.Supp. 1429 (W.D.Wis. 1995). Pet. App. at A15-A58. Judge Crabb ruled that Respondents Sasnett, Smith and Miller had shown beyond dispute that the jewelry ban violated RFRA. She enjoined Petitioners from enforcing the jewelry ban with respect to Respondents and any other inmates who could demonstrate sincere religious motivations for wearing jewelry. Pet. App. at A57. Contrary to Petitioners' assertion, Pet. at 3, Judge Crabb did not reach the collateral issues challenging the jewelry ban, including the First Amendment question.[3]

Petitioners appealed Judge Crabb's ruling to the United States Court of Appeals for the Seventh Circuit.[4] Specifically, they asserted that RFRA's compelling interest-least restrictive means test only applied when religiously mandated behavior was prohibited by government conduct, as opposed to the test based on sincere religious motivation which Judge Crabb had applied. They also argued that RFRA was unconstitutional. Petitioners did not assert that Judge Crabb erred in determining that the jewelry ban was not the least restrictive means of advancing a compelling state interest.

---

[3]In addition to the cross ban question, the cross-motions for summary judgment also involved Respondents' claim that another of Petitioners' IMPs, limiting to 25 the number of publications of any kind that an inmate might possess, violated RFRA and the Constitution. Any reasonable reading of Judge Crabb's discussion of the First Amendment issue makes very clear that the District Court considered it only with respect to the publication limit and not with respect to the jewelry ban. Pet. App. at A54-A55. Judge Crabb did not address Respondents' First Amendment challenge to the cross ban because it was unnecessary, having already granted all of the relief Respondents had sought on statutory grounds.

[4]Judge Crabb denied Petitioners' motion for a stay pending the appeal on December 27, 1995. Dist. Ct. R. 168.

The Court of Appeals affirmed Judge Crabb's rulings in all respects on August 2, 1996. Sasnett v. Sullivan, 91 F.3d 1018 (7th Cir. 1996). Pet. App. at A1-A10. Writing for a unanimous court, Chief Judge Posner ruled that RFRA was constitutional,[5] that Judge Crabb had applied the proper test in addressing Respondents' RFRA claim and that Petitioners' IMP failed that test. Petitioners now seek review of the Seventh Circuit's decision by this Court only on the question of RFRA's constitutionality.[6]

REASONS FOR DENYING THE WRIT

Petitioners seek a writ of certiorari to attack the constitutionality of the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§2000bb et seq. The same issue has been accepted for review by this Court in City of Boerne v. Flores, 117 S.Ct. 293 (Oct. 15, 1996). However, the fact that the Court has agreed to hear Flores does not require it to take this case. The Court's determination to grant the writ remains discretionary and Petitioners are not relieved of the burden of establishing that there are "compelling" reasons to do so. Sup. Ct. R. 10. Here, there are important reasons for denying the petition.

---

[5]Contrary to Petitioners' suggestion, Pet. at 7, Respondents did not repudiate the "ratchet theory" of Congress' power under U.S. Const., Amend XIV, §5.

[6]While the appeal was pending and in response to the District Court's injunction, Respondents issued a new IMP governing religious jewelry which became effective on May 15, 1996. The new IMP is set forth in Resp. App. at A6-A10. The new IMP permits inmates to possess a religious emblem up to 1-1/8 inches long and worth up to $10.00. Inmates may wear and display their emblem on necklaces in their cells, in designated areas and in the chapel. Inmates may also wear, but not display, the emblem while in transit within the institution. Requests for a religious symbol are directed to the warden, subject to security considerations and established rules concerning inmate purchases. Denial of requests must be explained in writing.

The case below was not about Congress' authority to enact RFRA; it was about an unreasonable and counter-productive correctional policy which was not lawful under any standards of scrutiny, including those established by the Free Exercise Clause of the First Amendment and the parallel provision of the Wisconsin Constitution. The sole effect served by the petition will be to protract this litigation and delay the inevitable demise of Petitioners' IMP. Petitioners make no arguments that are not already before the Court in Flores. Moreover, even if RFRA is unconstitutional, the ultimate outcome of this litigation is not likely to be affected by this Court's decision.

I. BACKGROUND OF RFRA AND APPLICATION IN THIS CASE.

The record below demonstrates the arbitrary unreasonableness of Petitioners' ban of selected religious symbols and underscores Respondents' argument that the ban is fatally flawed anyway under the Free Exercise Clause and under late-breaking Wisconsin case law interpreting that state's Freedom of Conscience provisions. The Court should not take the drastic step of striking down an Act of Congress in order to give Petitioners a second chance to resurrect their unsound policy.

In Employment Div., Dept. of Human Resources v. Smith, 494 U.S. 872, 878 (1990), this Court held that neutral laws of general applicability which incidentally burden the exercise of religion need not be justified by a compelling interest under the First Amendment's Free Exercise Clause. In response to Smith, Congress enacted the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§2000bb et seq. Pet. App. at A91-A95.

RFRA prohibits a government from imposing a substantial burden on a person's free exercise of religion, even through a generally applicable law, unless that government demonstrates that application of the burden to the person is the least restrictive means of furthering a compelling state interest. 42 U.S.C. §§2000bb-1(a), (b).[7]

Here, the District Court concluded and the Seventh Circuit agreed, that the appropriate test for determining the existence of a substantial burden on the exercise of religion was whether conduct or expression based on sincere religious motivation was significantly or meaningfully curtailed. Pet. App. at A43; Pet. App. at A8-A9. Applying that test, it was undisputed that religious symbols, including religious jewelry, played an important role in the practice of religion devotion. Pet. App. at A25-A28, A30. The crosses and crucifixes of Christians, such as Sasnett, Smith and Miller, were examples of such important religious symbols. Pet. App. at A30. These findings were consistent with this Court's long-standing recognition of the importance of religious symbols, including crosses, as a means of religious communication and practice. See, West Virginia State Bd. of Ed. v. Barnette, 319 U.S. 624, 632 (1943).

Petitioners' IMP obviously placed a substantial burden on this religious conduct. Respondents' were barred, under threat of disciplinary sanctions, from wearing, or even possessing, a Christian cross, no matter how unobtrusive and no matter how unconnected

---

[7]It is undisputed that RFRA's compelling interest test applies to prisons. Jolly v. Coughlin, 76 F.3d. 468, 475 (2d Cir. 1996) (collecting cases). See, 139 Cong. Rec. S14468 (daily ed. Oct. 27, 1993) (Senate vote rejecting amendment to exclude RFRA from prisons).

with illicit gang activities. Pet. App. at A25-A28. Under the IMP, a Christian's cross was contraband in the prisons of Wisconsin.

In light of this substantial burden, it was up to Petitioners to show that the ban on religious jewelry, like crosses and crucifixes, was the least restrictive means of furthering a compelling state interest. They failed dismally to meet this burden.

Petitioners cannot claim that the courts below failed to recognize the serious and delicate nature of maintaining order and security in prisons. The courts below expressly affirmed that Petitioners had a compelling interest in maintaining prison security. Pet. App. at A9.

However, Petitioners' failed to establish that their jewelry ban was the least restrictive means of advancing this interest. Beyond that, the undisputed evidence established that the jewelry ban would have failed a test calling for far less scrutiny than RFRA requires. The jewelry ban was the most restrictive means of advancing any conceivable security interest. At the same time, the ban contained many inexplicable exceptions.

Petitioners asserted that the jewelry ban was necessary to curb the use of gang identification symbols and to reduce the presence of expensive items which would be used in bartering and strong-arming or fostering false claims of loss or theft. Pet. at 2. Petitioners did not try to justify the IMP as a ban on potential weapons but Respondents, and the courts below, addressed that issue anyway. Both courts below forcefully concluded that Petitioners had failed to identify any security concern which could not be adequately addressed by time,

place and manner restrictions rather than a complete ban on crosses, crucifixes and other religious emblems. Pet. App. at A9, A53-A54.

Petitioners have never argued that the problems they face in administering Wisconsin's prisons are any more serious than those confronting prison administrators throughout the land. Yet, Wisconsin's ban of religious jewelry is far more draconian than the policies of other prison systems. The United States Bureau of Prisons permits inmates to wear or use personal religious items, including medallions, "ordinarily" during services and, otherwise, with permission within the institution. 28 C.F.R. §548.16. Illinois permits the possession of religious symbols up to two inches long and worth up to $50. Ill. Adm. Code, Title 20, §425.90(c)(2). New York permits the wearing of religious jewelry and symbols underneath clothing, and a court has enjoined even that restriction to the extent it prohibits the use of a Muslim's dhkir beads during prayer. Alameen v. Coughlin, 892 F.Supp. 440, 442 n.1, 451 (E.D.N.Y. 1995). Texas permits the wearing of religious insignia in cells and at religious services. Muhammad v. Lynaugh, 966 F.2d 901, 903 (5th Cir. 1992).

Indeed, a former head of the Wisconsin correctional system, the very system Petitioners represent, testified emphatically that the jewelry ban was not a reasonable means of dealing with important prison security interests. He stated that:

> . . . I think you want to be careful in limiting religious activities, religious symbols, when there are so many benefits to them and their return in terms of control of illegal activity, is so slight, if there's any return at all.

Dep. of Prof. Walter J. Dickey, Dist. Ct. R. 85 at 66.

> [T]o say that it should be an across-the-board limitation of religious jewelry, just -- I mean, again, its too mindless. I mean, it's too rigid. It's too extreme.

Id., at 67-68.

Petitioners claimed that they could not tell the difference between jewelry worn as a symbol of religious devotion and jewelry worn to identify with a gang. Other courts have found that argument hard to accept, Alameen, 892 F.Supp. at 450-51; Campos v. Coughlin, 854 F.Supp. 194, 209 (S.D.N.Y. 1994), and the District Court and the Court of Appeals clearly rejected it.

Nothing in the record suggests that confusion between symbols worn for gang purposes and those worn for sincere religious reasons has occurred or would occur very often. Professor Dickey testified that competent prison officials could make satisfactory determinations of whether conduct is legitimately religious. Dist. Ct. R. 85 at 75-76. Such determinations, involving fact findings and assessments of credibility and sincerity, are subject only to the most deferential standard of judicial review.

Petitioners' assertion that they cannot identify symbols worn for sincere religious purposes defies credulity because their own rules expect and require them to make such judgments. Thus, Petitioners have issued nineteen pages of IMPs identifying permitted religious practices, rituals and devotional materials. Wis. DOC, IMP 6 et seq. Dist. Ct. R. 147. Catholics, for example, may possess a rosary, Wis. DOC, IMP 6-B, a particularly

interesting point to Judge Posner and an exception to the jewelry ban Petitioners were unable to explain away. Pet. App. at A9.

Petitioners' permit the possession and use of several other articles which demonstrate the arbitrariness of defining crosses as "jewelry."[8] Many of the permitted items serve the same role in prayer and devotion as the crosses and crucifixes used by Sasnett, Smith and Miller. Buddhists may have prayer beads. Wis. DOC, IMP 6-A. Jews may have phylacteries, small leather containers containing holy inscriptions and used in prayer. IMP 6-F. Muslims may have prayer beads. IMP 6-G. Native Americans may possess medicine bags. IMP 6-H. True, there are restrictions on the wearing and use of some of these items, but inmates may possess and engage in religious devotion with them. If Petitioners are competent to identify these items as legitimately used for religious purposes, there is no reason they cannot in most cases also identify other items used for sincere religious purposes, like the modest and relatively unadorned crosses and crucifixes used by Respondents.

Moreover, promulgated regulations require Petitioners to identify religiously motivated practices. Inmates may make requests to engage in religious practices which depart from institutional routines.

---

[8]Promulgated regulations also permit the wearing of "required" religious medals. Wis. Adm. Code, §DOC 309.61(6). Resp. App. at A5. However, it appeared during the litigation that Petitioners regarded this as a doctrinal rather than a personal requirement, and, in any event, did not permit inmates to possess crosses whether their religious beliefs required so or not. Moreover, both the District Court, Pet. App. at A43, and the Court of Appeals in another case, Mack v. O'Leary, 80 F.3d 1175, 1179 (7th Cir. 1996), ruled that religious "requirements," as opposed to religious motivations, are not appropriate criteria for determining substantial burdens on religion.

> Upon receipt of the request, the superintendent, with the assistance of the Chaplin or designated staff person with appropriate religious training, shall determine if the request is motivated by religious beliefs.

Wis. Adm. Code §DOC 309.61(2)(b). Resp. App. at A4. This is a fully promulgated rule, not merely an IMP. Petitioners claim that they cannot identify jewelry worn for sincere religious purposes flies in the face of this rule and cannot withstand scrutiny of any sort.

Similarly, the jewelry ban is a poor means of protecting against theft, bartering and strong-arming. The same IMP which bans Respondents crosses and crucifixes, no matter how inexpensive, inexplicably permits inmates to have $75 watches and wedding rings of unlimited value. Pet. App. at A96-A97. Other property rules permit inmates to possess up to $350 worth of electronics and musical equipment. DOC 309, IMP #1, ¶7. Dist. Ct. R. 124. Other individual items may be worth up to $75. Id. However, inmates may not possess crosses no matter how inexpensive.

To deal with the threat of false claims, there is no reason why Petitioners cannot simply keep a written record of religious emblems which is precisely what their new IMP provides. Resp. App. at A8, A10. A written record of the religious symbols possessed by inmates is certainly an adequate means of insuring that inmates will not be able to get away with claiming they have lost what they never had.

In sum, Petitioners' ban of religious symbols just because they happen to be "jewelry" is purely gratuitous. This point was recognized emphatically by Judge Posner, writing for the unanimous panel of the Seventh Circuit.[9]

> The regulation to which the defendants refuse to make an exception forbids the wearing of a crucifix even if it is too small or light to be a weapon (at least more of a weapon than a fist, a tooth, or a fingernail), too inexpensive to barter for a weapon, invisible because worn under clothing, and not a gang symbol or easily confused with one. The state allows prisoners to have rosaries, which could be used to strangle a fellow prisoner or a guard, and bans crucifixes even in correctional facilities wholly occupied by white-collar prisoners who do not belong to gangs or get into fights with each other or the guards. These features of the state's practice blast the case for regarding a ban on crucifixes and other religious jewelry as a serious and measured response to a concern with violence or a concern with gangs, legitimate and important as these concerns are.

Pet. App. at A9 (emphasis added).

This Court is faced with a docket of thousands of cases. Many of them raise serious and important issues but the Court properly exercises its discretion not to hear them because demands of limited resources require that only a few of the most important be given the Court's attention. Petitioners come before this Court asserting that its policy banning religious jewelry, so thoroughly and vigorously repudiated by Judge Posner and the Court of Appeals, as well as by the District Court, is one of those chosen few cases worthy of this Court's review. Beyond that, Petitioners pray that this Court strike down as facially and completely invalid a duly enacted Act of Congress, "'the gravest and most delicate duty that

---

[9]Judge Crabb thought Petitioners' claimed validity of the IMP had such little merit on appeal that she refused to grant Petitioners' motion to stay the injunction pending the appeal. Dist. Ct. R.168.

this Court is called upon to perform,'"[10] so that they might have a chance to re-litigate the lawfulness of that policy. This "mindless," "rigid" and "extreme"[11] ban on religious jewelry, which is not a "serious and measured response"[12] even to legitimate concerns of prison security should not be dignified with a place on the docket of this Court.

II. THE BAN ON RELIGIOUS JEWELRY VIOLATES THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT.

Even should this Court find RFRA unconstitutional and vacate the judgments of the courts below, the result will simply be further litigation which likely will reach the same outcome, the end of the ban on crosses and other religious symbols. As discussed above, at n. 3, and contrary to Petitioners' unjustified reading of Judge Crabb's decision, the District Court left open the question of whether Petitioners' jewelry ban violated the First Amendment's Free Exercise Clause. See Pet. App. at A54-A55. Should the matter ultimately be considered, Respondents, not Petitioners, will prevail.

The Religious Freedom Restoration Act does not purport to set the standard for analyzing claims under the Free Exercise Clause. Instead, in the prison setting, the test continues to be the reasonableness test of Turner v. Safley, 482 U.S. 78, 89 (1987), and O'Lone v. Estate of Shabazz, 482 U.S. 342, 349 (1987). See, Jolly v. Coughlin, 76 F.3d 468,

---

[10] Fullilove v. Klutznick, 448 U.S. 448, 472 (1980) (Burger, C.J., opinion) (quoting Blodgett v. Holden, 275 U.S. 142, 148 (1927) (Holmes, J., opinion)).

[11] Dep. of Prof. Walter J. Dickey, former Administrator, Wisconsin Div. of Corrections. Dist. Ct. R. 85 at 68.

[12] Judge Posner for the unanimous Court of Appeals below. Pet. App. at A9.

475 (2d Cir. 1996). In Turner, 482 U.S. at 89, a free speech case, and O'Lone, 482 U.S. at 349, a free exercise case, the Court held that prison regulations and policies alleged to infringe on First Amendment rights should be upheld if reasonably related to legitimate penal interests.

Turner and O'Lone decidedly do not give prison administrators carte blanche to impose groundless infringements on an inmate's religious rights. "Prison walls do not form a barrier separating prison inmates from the protections of the Constitution." Turner, 482 U.S. at 84. The regulation must be "'reasonably related'" to the penal interests and "'exaggerated responses'" even to legitimate concerns will not stand scrutiny. Turner, 482 U.S. at 87. The "regulation must have a logical connection to legitimate governmental interests invoked to justify it." O'Lone, 482 U.S. at 350 (emphasis added). Here, the policy that Judge Posner and the Seventh Circuit "blast[ed]" as failing to be a "serious and measured response to a concern with violence or a concern with gangs, legitimate and important as these concerns are . . .," Pet. App. at A9, is certainly an exaggerated response which lacks a logical connection to the concerns purportedly justifying it.[13]

---

[13]Although compelling interest scrutiny is not available to Respondents under the First Amendment, we note that Petitioners' jewelry ban did not merely inflict an incidental burden on Respondents' religious observance. As the petition, at 2, indicates, religious jewelry, especially crosses, was deliberately included within the sweep of the ban. See, Pet. App. at A20-A21.

Williams v. Lane, 851 F.2d 867, 877 (7th Cir. 1988), cert. denied, 488 U.S. 1047 (1989), sets forth a concise summary of the factors addressed in considering the Turner-O'Lone standard. The Court must inquire into:

1. "whether a valid, rational connection exists between the regulation and a legitimate government interest behind the rule";

2. "whether there are alternative means of exercising the right in question that remain available to prisoners";

3. "the impact accommodation of the asserted constitutional right would have on guards and other inmates and the allocation of prison resources"; and

4. "although the regulation need not satisfy a least restrictive alternative test, the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable."

With respect to the first Turner-O'Lone factor, certainly the Seventh Circuit's comments previously quoted, Pet. App. at A9, strongly suggest that it does not believe that the ban on crosses and crucifixes, and other religious symbols had a "valid, rational connection" with any legitimate governmental interests. Professor Dickey, former head of Petitioners' correctional system, said as much. Dist. Ct. R. 85 at 66, 67-68. Even crosses, crucifixes and other religious symbols obviously used for religious purposes and harmlessly made and modestly priced were contraband.

Yet, the ban contained odd exceptions. Inmates could possess rosaries, Muslim and Buddhist prayer beads, Jewish phylacteries and Native American medicine bags. Wis. DOC IMP ##6 et seq., Dist. Ct. R. 147. Any of these can be used as a weapon, as Judge Posner

noted with respect to rosaries. Pet. App. at A9. Prisons elsewhere have tried to restrict the display of prayer beads because of their potential as gang symbols, Campos v. Coughlin, 854 F.Supp. 194 (S.D.N.Y. 1994), but Petitioners do not regard the possession, at least, of these items as troublesome. Prisons have tried to restrict the possession of medicine bags because of their potential for use in drug smuggling, Werner v. McCotter, 49 F.3d 1476, 1481 (10th Cir. 1995), but possessing, if not wearing, these does not bother Petitioners.

However, under Petitioners' ban, Christians could not wear and, other than the Catholic's rosary, could not even possess, the symbol of the cross or a crucifix, no matter how unobtrusive and no matter how unconnected with gang activity. Under the ban, inmates could wear expensive wedding rings or $75 watches but not $10 crosses. There is no rational basis relating to the risk of property crimes, for this distinction. Christian inmates could not wear crosses if their weapons potential was no greater than that of a charm. The Free Exercise Clause cannot be so devoid of meaning, even in the prison context, as to sustain Petitioners' arbitrary and capricious judgment as to what its jewelry ban permitted or forbade.

Turning to the second Turner-O'Lone factor, there is no adequate alternative to Respondents' possession of their crosses and crucifixes. Sasnett, Smith and Miller presented uncontroverted evidence that the cross was a centerpiece of their prayer and devotion. Pet. App. at A25-A28. The importance of the cross in the Christian faith is obvious and has been recognized by this Court. West Virginia State Bd. of Ed. v. Barnette, 319 U.S. 624, 632 (1943). Petitioners know this because they permit the possession of rosaries. Petitioners also

recognize the importance of the devotional objects of other religions, such as the ones discussed above, which serve a purpose similar to Respondents' crosses. While O'Lone certainly permits restrictions on these items, it does not permit a gratuitous total ban based on Petitioners' exaggerated claims and arbitrary distinctions.

The third Turner-O'Lone factor requires inquiry into the impact of permitting the items on guards, other inmates and prison resources. As discussed in the previous section, prison administrators in other jurisdictions have had no problems permitting religious symbols. Petitioners themselves have no problems with the possession of rosaries, prayer beads and medicine bags. Petitioners may place appropriate restrictions on possessing religious symbols. A complete ban is not appropriate.

With respect to the treatment of other inmates, it is Respondents who have been treated unequally. There is no legitimate penal interest, for example, in permitting inmates to possess prayer beads but not crosses. As for non-religious inmates who may wish to possess crosses or crucifixes, they will not suffer the spiritual damage that the ban inflicted on religious inmates.

The fourth Turner-O'Lone factor requires the examination of alternatives. Once again, we call attention to the policies of other jurisdictions discussed in the previous section which permit the right to possess religious symbols. Professor Dickey suggested size, material, value, and manner of affixing restrictions. Dist. Ct. R. 85 at 68-69. Petitioners selected the worst possible alternative, a total ban.

Finally, it is important to note the important benefits religion imparts not only on the inmate but on the orderly running of the institutions and rehabilitation interests, as well. These are a matter of undisputed fact, Pet. App. at A30-A31, and are recognized in Petitioners' own rules. Wis. Adm. Code §309.61(1)(a). Resp. App. at A4. This makes more puzzling Petitioners' failure to recognize, as Professor Dickey noted, that their ban on religious jewelry does more harm than good. Dist. R. 85 at 66. The best way to curb gang activities is to promote alternatives such as religious activities.[14]

III. PETITIONERS' BAN ON RELIGIOUS JEWELRY VIOLATES THE WISCONSIN CONSTITUTION.

On June 19, 1996, while the appeal in this case was pending, the Supreme Court of Wisconsin held that Wisconsin's Freedom of Conscience Clause, Wis. Const., Art. I, §18, Resp. App. at A3, requires compelling interest-least restrictive means scrutiny for substantial burdens imposed on the exercise of religion by generally applicable laws. State v. Miller, 202 Wis.2d 56, 66-69, 549 N.W.2d 235, 239-41 (1996). In doing so, the Wisconsin court expressly declined to follow the path taken by this Court in Employment Div., Dept. of Human Resources v. Smith, 494 U.S. 872 (1990).

Miller represents an important new development in Wisconsin constitutional law. In the earlier review of the same case, the Wisconsin Court of Appeals, had ruled that

---

[14]Even if the record is insufficient to establish that we are entitled to summary judgment on the First Amendment claim, it is certainly sufficient to deny summary judgment to Petitioners. Professor Dickey, who was a predecessor of Petitioner Sullivan as head of the Wisconsin correctional system, deposed that Petitioners' jewelry ban was "too mindless," "too rigid" and "too extreme." Dist. Ct. R. 85 at 68. Thus, there are no circumstances under which a remand can result automatically in an entry of judgment for Petitioners.

Wisconsin's Freedom of Conscience Clause must be interpreted in light of this Court's cases interpreting the Free Exercise Clause. State v. Miller, 196 Wis.2d 238, 245, 538 N.W.2d 573, 576 (Ct. App. 1995). Wisconsin appellate courts had so ruled on numerous occasions. See, e.g., Jocz v. LIRC, 196 Wis.2d 273, 297-98 and n.12, 538 N.W.2d 588, 595-96 (Ct. App. 1995); In re Marriage of Lange v. Lange, 175 Wis.2d 373, 383-84, 502 N.W.2d 143, 147-48 (Ct. App. 1993) (following Smith), rev. denied, 505 N.W.2d 137 (Wis. 1993), cert. denied, 114. S.Ct. 1416 (1994).

Nothing in the Wisconsin Supreme Court's decision in Miller suggests that inmate cases require a different level of scrutiny. This is significant because no published Wisconsin appellate decision, as far as we are aware, has considered whether Wisconsin's Constitution requires the Turner-O'Lone reasonableness test in the prison setting.[15] Thus, it must be presumed that, just as Congress intended RFRA to protect inmates, the Wisconsin Supreme Court intends the compelling interest-least restrictive means test to apply across the board.

Because Wisconsin now requires compelling interest-least restrictive means scrutiny for burdens on the exercise of religion under its own constitution, an independent state ground now exists for the judgment in this case. Having failed RFRA's compelling interest-

---

[15]Wisconsin courts have followed Turner and O'Lone in interpreting the United States Constitution. See, e.g., Yoder v. Palmeri, 177 Wis.2d 756, 760-61, 502 N.W.2d 903, 905-06 (Ct. App. 1993); Casteel v. McCaughtry, 168 Wis.2d 758, 766, 484 N.W.2d 579, 582 (Ct. App. 1992), mod. on other grounds, 176 Wis. 2d 571, cert. denied, 114 S.Ct. 327 (1993).

least restrictive means test, it is inconceivable that Petitioners would prevail under the same test applied as a matter of Wisconsin constitutional law.[16]

IV. THE ONLY EFFECT OF GRANTING THE WRIT WILL BE TO PROTRACT THIS LITIGATION AND CAUSE UNCERTAINTY IN THE OPERATION OF THE WISCONSIN CORRECTIONAL SYSTEM.

The only issue presented in the Petition, RFRA's constitutionality, is already before the Court in Flores. Petitioners raise no additional arguments and offer no new insight to inform the Court's disposition of the issue. Indeed, Petitioners' arguments for striking down RFRA are expressly based on the analysis of counsel for the Flores petitioner. Pet. at 4 n. 2. Petitioners, Pet. at 4, 14, make very clear that they do not want this case to be briefed or heard. Instead, they want "tag-along" relief should the Flores petitioner prevail. In short, the Petition is no more "a serious and measured response," Pet. App. at A9, than the ban on religious symbols itself. Petitioners are simply using this Court as a forum for private and summary relief.[17] Their failure to appreciate the gravity of this Court's task is itself grounds for denying the writ.

---

[16]The Amended Complaint does not allege that the ban on religious emblems violates the Wisconsin Constitution. However, we are not asking the Court to affirm the decisions below on this ground. We are merely asking the Court to exercise its discretion and deny the writ. If this case is remanded, the District Court is unlikely to deny a motion to amend the complaint under Fed.R.Civ.Pr. 15(a), which permits amendments "freely given when justice so requires." As discussed, the Wisconsin Supreme Court's decision is a substantial change in the law of that state which was not issued until the appeal was already pending in this case. The record already exists to determine the issue on Wisconsin constitutional grounds. Petitioners will not be prejudiced by an amendment to the complaint because any other inmate desiring to wear a cross or other religious symbol will ultimately obtain the same relief.

[17]Petitioners are also seeking a back-door means of avoiding the attorneys' fees awarded in this case.

If the Court is inclined to rule RFRA unconstitutional, denying the writ will have no effect on the precedential value of the decisions of the courts below. The Court has repeatedly advised that "'denial of a writ of certiorari imports no expression of opinion upon the merits of the case.'" Teague v. Lane, 489 U.S. 288, 296 (1989) (citation omitted). If the Court ultimately determines that RFRA is unconstitutional, then the opinions below have no value as precedent (on the constitutional issue at any rate) whether or not the writ is granted in this case. Conversely, if RFRA is upheld, the opinions of the Courts below will carry the same weight regardless of whether or not the writ is granted.

Denying the writ will not deprive Petitioners of relief, if they are entitled to it, even if the Court strikes down RFRA. As the Court of Appeals made plain, the recently enacted Prison Litigation Reform Act of 1996, Pub. L. 104-134, Title VIII (18 U.S.C. §3626), permits Petitioners "to ask the district court to modify an injunction in light of changed circumstances, including a change in the applicable law." Pet. App. at A10.

However, granting the writ will cause substantial uncertainty in the operation of the Wisconsin correctional system. Due to the injunction, since May 15, 1996, Wisconsin has permitted inmates to acquire religious emblems. Above at n.6; Resp. App. at A6-A10. If RFRA is ultimately upheld then the presence of this case on the Court's docket will have achieved nothing but needless uncertainty about the status of that new policy.

Even, if RFRA is ultimately struck down, the old jewelry rule would not be restored automatically. The District Court will have to address the other issues discussed in the

previous two sections. Even if we do not prevail, Petitioners would then have to cancel the new policy and order inmates to dispose of any emblems they have already acquired. In short, even if RFRA is unconstitutional, granting the writ in this case will open up a Pandora's Box of uncertainty and perhaps further litigation involving other inmates challenging the ban under the Wisconsin Constitution in state court.

Moreover, by the time the Court decides this case on the merits, the new rule will have been in effect for almost, perhaps more than, a year. Petitioners might decide that the new policy is workable and satisfies both institutional and inmate needs.[18] In that circumstance, this Court's decision on the merits will only have the practical effect of an advisory opinion. By contrast, again, if the writ is denied, Petitioners can always seek relief under the Prison Litigation Reform Act if the new rule is unworkable and RFRA is unconstitutional.

In sum, granting the writ and deciding this case on the merits will have no effect on the underlying relief, one way or the other.

V. RFRA IS CONSTITUTIONAL

Respondents argue that RFRA exceeds the powers granted Congress by U.S. Const., Amend XIV, §5 and violates Separation of Powers principles. Judge Posner, writing for the Court of Appeals below, rejected these arguments. Sasnett v. Sullivan, 91 F.3d 1018, 1019-22 (7th Cir. 1996) (Pet. App. at A3-A8; Resp. App. at A1-A2). The Fifth Circuit had previously declared RFRA constitutional in a unanimous panel decision written by Judge

---

[18]The new IMP is not without its own shortcomings, but that is not a subject before this Court.

Higginbotham. Flores v. City of Boerne, 73 F.3d 1352, 1356-65 (5th Cir), reh'g en banc denied, 83 F.3d 421 (5th Cir. 1996), cert. granted, 117 S.Ct. 293 (Oct. 15, 1996). Judge Buckley and another unanimous appellate panel has also held RFRA constitutional, addressing Establishment Clause and Separation of Powers issues. E.E.O.C. v. Catholic Univ., 83 F.3d 455, 469-70 (D.C. Cir. 1996).[19] In Sasnett, the Seventh Circuit sustained RFRA because it gave otherwise disadvantaged persons a meaningful right to exercise their religion. Resp. App. at A1-A2. The Court drew not only on underlying Free Exercise Clause principles but equal protection principles as well.

A "strong presumptive validity" accompanies Acts of Congress. United States v. National Dairy Products Corp., 372 U.S. 29, 32 (1963). This presumption is a "steely realism and not merely a protocol of manners or an empty formalism." Flores, 73 F.3d at 1356.

U.S. Const., Amend. XIV, §1 forbids states from depriving persons of liberty without due process and denying persons the equal protection of the laws. The due process protection incorporates First Amendment rights. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940). Section 5 provides that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article." In its sphere, the Fourteenth Amendment represents a grant of plenary authority to Congress and a corresponding diminution of the power of the states. Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).

---

[19]Although some judges have opined that RFRA is unconstitutional in isolated district court opinions and appellate dissents, no appellate court, state or federal, has found RFRA to be unconstitutional and nearly all of the lower courts have also upheld it.

Under any view, Congress' power under §5 is broad. Congress may enact any appropriate legislation, not otherwise prohibited, aimed at carrying out the proscriptions of the Fourteenth Amendment and in order "'. . . to secure to all persons the enjoyment of perfect equality of civil rights. . . ." Katzenbach v. Morgan, 384 U.S. 641, 651 (1966) (quoting Ex parte Virginia, 100 U.S. 339, 345-46 (1880)).

Morgan, which commanded a 7-2 majority, remains the leading case for analyzing Congress' authority under §5. There, the Court upheld a Voting Rights Act provision which prohibited a state's administration of literacy tests to those who had been educated in non-English schools in Puerto Rico. A previous case, Lassiter v. Northampton County Bd of Election, 360 U.S. 45 (1959), had sustained such literacy tests under the Fourteenth and Fifteenth Amendments.

The Court in Morgan offered two separate rationales. Under the "substantive" theory, Congress could conclude, through its own fact-finding, that the literacy test itself violated the Equal Protection Clause, Lassiter notwithstanding. Morgan, 384 U.S. at 653-56. Petitioners do not dispute that RFRA is constitutional should the "substantive" theory still have vitality.[20] Pet. at 7 - 8. Petitioners want to pigeonhole RFRA as sustainable only under this theory and then have the Court rule that the theory itself is no longer law.

---

[20]We reserve the right to brief the question of the "substantive" theory's continued vitality should the Court grant the petition.

However, Petitioners drastically understate Congress' authority under Morgan's "remedial" theory. Petitioners suggest that Congress may prohibit only unconstitutional conduct and such constitutional conduct that might be hard to distinguish from it. However, the Court in Morgan held that Congress could prohibit the literacy test because Congress could conclude that such tests had "[t]he practical effect" of denying members of the Puerto Rican community the right to vote which, in turn, was necessary for it to fight discrimination in obtaining equal treatment in other areas. 384 U.S. at 652-53. Thus, as Judge Posner noted Morgan's remedial theory is really an "empowerment" theory. Sasnett, 91 F.3d at 1022. Resp. App. at A1-A2. Congress may remedy discriminatory effects, not merely as incidental to rectifying the evil of discriminatory intent, but because Congress may conclude that discriminatory effects are evil in their own right. Congress may do so, not as a matter of redefining constitutional rights, but as a means of creating statutory remedies which reduce discriminatory "treatment" in the community at large by making those rights recognized in the Constitution, the right to vote in Morgan, more meaningful and effective. 384 U.S. at 652. RFRA does precisely this, taking a recognized right, to the free exercise of religion, and making it more effective by reducing substantial burdens, thereby enhancing the ability of religious adherents to become equal participants in the activities of the community at large.

The Court has continued to recognize the "empowerment" theory. "The power to 'enforce' may at times also include the power to define situations which Congress determines threaten principles of equality and to adopt prophylactic rules to deal with those situations."

City of Richmond v. J.A. Croson Co., 488 U.S. 469, 490 (1989) (O'Connor, J., opinion) (emphasis in original). Thus, in Oregon v. Mitchell, 400 U.S. 112, 118 (1970), an otherwise divided Court followed Morgan by unanimously sustaining, albeit on differing grounds, a nationwide ban on literacy tests, even in places that had no demonstrated history of discrimination. Mitchell, 400 U.S. at 118, 132-34, 144-47, 216-17, 231-36, 282-84 (five opinions, nine justices).

The Court has established that while the Fourteenth and Fifteenth Amendments themselves prohibit only purposeful racial discrimination, Washington v. Davis, 426 U.S. 229, 239 (1976) (14th Amend.); City of Mobile v. Bolden, 446 U.S. 55, 65 (1980) (Stewart, J., plurality) (15th Amend.), Congress' powers to enforce those provisions permit it to prohibit state activities which have a discriminatory effect as well. Fullilove v. Klutznick, 448 U.S. 448, 477 (1980) (Burger, C.J., opinion) (14th Amend.); City of Rome v. United States, 446 U.S. 156, 173 (1980) (15th Amend.). The Court has recognized that purposeful discrimination becomes ingrained in society so that its effect lingers on long after the intent may be rooted out. City of Rome, 446 U.S. at 175-77. Thus, "congressional authority extends beyond the prohibition of purposeful discrimination to encompass state action that has discriminatory impact perpetuating the effects of past discrimination." Fullilove, 448 U.S. at 477 (emphasis added). Commenting on these cases, Judge Higginbotham noted "[d]ispensing with the constitutionally rooted requirement that discrimination be purposeful is an extraordinary exercise of power." Flores, 73 F.3d at 1361-62.

Congress' §5 power is broad in other respects as well. In Fitzpatrick v. Bitzer, 427 U.S. 445, 456-57 (1976), the Court held that U.S. Const., Amend. XIV, §5 limited a state's Eleventh Amendment immunity, thus permitting Title VII claims which drew from the state's treasury. In so ruling, the Court sustained Congress' authority to intervene in states' management of their own employees in order to root out discriminatory conduct.

However prescient the dissent in E.E.O.C. v. Wyoming, 460 U.S. 226, 259-64 (1983) (Burger, C.J.), may or may not be on the continued vitality of Morgan's "substantive" theory, it does not suggest a diminution of Congress' authority to root out discriminatory effects. In Wyoming, 460 U.S. at 262, the dissenters opposed the notion that Congress, under §5, could define rights independently of the Court.[21]

RFRA does not so define new rights out of whole cloth. In Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 113 S.Ct. 2217 (1993), the Court reiterated the fundamental nature of the right to the free exercise of religion. Religious discrimination, overt or masked, is unconstitutional. 113 S.Ct. at 2227. Nothing in the Wyoming dissent suggests departure from the principle that Congress has §5 authority to protect recognized rights, such as the free exercise of religion, from discriminatory effects.

While RFRA may be novel in some respects, Congress' authority to enact accommodations of religion is not a novel concept. A legislature's authority to protect the exercise of religion from the burdens of neutral laws is well established. Walz v. Tax

---

[21]The majority disposed of the issue before the Court on Commerce Clause grounds. 460 U.S. at 243.

Commission, 397 U.S. 664, 673 (1970); Corporation of Presiding Bishop v. Amos, 483 U.S. 327, 338 (1987).

Congress' broad authority to relieve religious observers of the impact of neutral policies is clearly implicit in the case law of Title VII. Since 1972, Title VII of the Civil Rights Act of 1964 requires employers, including states, to make reasonable accommodations for the religious observance of their employees unless those accommodations would cause undue hardship. 42 U.S.C. §§2000e-2(a)(2), 2000e(j). These provisions operate where neutral rules of general applicability conflict with religious practices. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 87 (1977) (Marshall, J., dissenting); Ansonia Bd. of Ed. v. Philbrook, 479 U.S. 60, 76 (1986) (Stevens, J., dissenting).

Although Fitzpatrick, discussed above, involved a Title VII sex discrimination action, nothing in it suggests that the religious accommodation provisions are not similarly valid against state employers. Indeed, in Ansonia Bd. of Ed. v. Philbrook, 479 U.S. 60 (1986), the Court applied and interpreted the religious accommodation provisions of Title VII against a local public school board without questioning Congress' authority to enact them.

Several justices have affirmatively noted that the religious accommodation provisions of Title VII are constitutionally sound. Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 712 (1985) (O'Connor, J., with Marshall, J., concurring) (calling provisions "an anti-

discrimination law"); Edwards v. Aguillard, 482 U.S. 578, 617-18 (1987) (Scalia, J., with Rehnquist, C. J., dissenting)[22].

The religious accommodation provisions of Title VII, anti-discrimination provisions designed to curb the burdens inflicted by neutral work rules of all types in the employment setting, and applicable to state employers, has been a part of our law for a quarter of a century. While the Court has never squarely ruled that they are a valid exercise of Congress' §5 power, the Court's implicit understanding of their validity severely undermines Petitioners' challenge to RFRA in several respects:

1. Congress may enact religious accommodations as a means of reducing the discriminatory effects of formally neutral burdens on religion.

2. State, as well as private employers, have policies which impose substantial burdens on religious observers and Congress may correct the discriminatory effect of these burdens.

3. If Congress may intervene in the way states treat their own employees, it is inconceivable that Congress does not also have broad authority to require states to accommodate the religious practices of those they seek to regulate.

4. Title VII does not create a specific exemption. It applies any time the employer's practices and the employee's religious observance conflict.

---

[22]Indeed, these opinions suggest that the only disputable issue on the constitutionality of Title VII lies in its application to private employers, since by its terms, the Free Exercise Clause is applicable only to governments. See, Estate of Thornton, 472 U.S. at 712 (O'Connor, J., concurring).

5. In order to determine whether a conflict between the employer's policy and the employee's religious practice exists, a court must determine that there was a religious practice and a conflict, precisely the kind of questions a court must consider under RFRA.

Employment Div., Dept. of Human Resources v. Smith, 494 U.S. 872 (1990), affirms these principles. Read concisely, Smith stands for the proposition that the Court in the first instance, that is in interpreting the Constitution, should not be the arbiter of social policy in determining the extent to which religious practices should be relieved from the burden of neutral laws. That determination appropriately lies with the political process. 494 U.S. at 890.[23] With RFRA, the political process has acted.

While Respondents deprecate an asserted lack of evidence supporting the need for broad-based religious exemptions from formally neutral laws, the Court's task is not to re-weigh the evidence in the Congressional record but merely "to perceive a basis upon which the Congress might resolve the conflict as it did." Morgan, 384 U.S. at 653. "Congress, of course, may legislate without compiling the kind of 'record' appropriate with respect to judicial or administrative proceedings." Fullilove, 448 U.S. at 478 (Burger, C.J., opinion).

Moreover, whatever may be the shortcomings of the several hundred pages of hearings and floor discussions on RFRA as a documentation of the need for it, this Court is

---

[23] Smith did not limit permissible accommodation to specific exemptions. See, Flores, 73 F.3d at 1363. The Court provided an example of a specific exemption, for religious use of peyote, merely because that was the issue in the case. However, Title VII provides a general exemption across the board in the employment field and has survived for twenty-five years without question.

well aware of a further crucial point. "[S]ignificant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it." United States v. Gainey, 380 U.S. 63, 67 (1965). As the representative branch, Congress has the duty to determine what is abroad in the land, and in discharging that duty its members bring far more to the table than what turns up in the record.

Here, the basis for Congress' action is readily apparent. The history of official discrimination of religious conduct has been noted by this Court.

> Governments have not always been tolerant of religious activity, and hostility toward religion has taken many shapes and forms--economic, political and sometimes harshly oppressive.

Walz, 397 U.S. at 673. Examples in this country are well known--Mormons were chased across the country. Jehovah's Witnesses were driven off the streets. Catholics were thwarted from setting up their own schools. See, Pierce v. Society of Sisters, 268 U.S. 510 (1925). The churches of African-Americans were suppressed and bombed. Overseas, the persecution of Jews in Nazi Germany is an horrific example of bigotry by bureaucracy. See, Lucy S. Dawidowicz, The War Against the Jews, 1933-1945, at Chs. 3-8, (1975).

Today's unfamiliar religions are likely to be non-Christian--Muslims or Buddhists, or "fusion" religions such as Santeria. Intentional discrimination against these "new" groups is rearing its ugly head. See, Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 113 S.Ct. 2217 (1993). Congress should not have to wait until bigotry erupts beyond control in order to protect the religious.

The trappings of the official bigotry which damaged the cause of equality in the early history of this country remain in the form of ignorant or indifferent stereotypes about what constitutes proper religious behavior. Insulated bureaucrats are especially vulnerable to regard with suspicion any unfamiliar practice or even the familiar practices of those who do not fit their standards. This leads them to unjustified conclusions such as that of Petitioners here, that the cross of a proved Christian may well be just another gang symbol which must be obliterated from the environment.

In enacting, RFRA, especially by such an overwhelming margin (unanimous voice vote in the House, 97-3 in the Senate), Congress has clearly shown that the people of this country have made the political and social choice that bureaucracies must be more respectful of everybody's religious practices.

The care that Congress took in exercising its duty of carrying out the will of the polity is clearly seen in the floor debate in the Senate on whether to exclude inmates from RFRA's protection. 139 Cong. Rec. S14350-68 (daily ed. Oct. 26, 1993); 139 Cong. Rec. S14461-68 (daily ed. Oct. 27, 1993). Senators drew on every source of information and balanced the need for more protection of inmates' religious rights with the cost of providing those rights. In considering this and other implications of RFRA, Congress was acting in precisely the way the Court in Smith, 494 U.S. at 890, thought that it should.

Moreover, Congress considered the sweeping nature of RFRA's scope and again, the political process was acting as Smith anticipated it would. In Smith, the Court recognized

that "leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in . . . ." 494 U.S. at 890. Congress, as the ultimate arbiter of the competence of the political process, specifically found that piecemeal legislation, especially at the state and local level, was inadequate to address the problems created by burdens on religion. H.R. Rep. 103-88, Religious Freedom Restoration Act of 1993, at 6 (May 11, 1993); S. Rep. 103-111, Religious Freedom Restoration Act of 1993, at 8 (Jul. 27, 1993).

As Judge Posner noted,

> [r]eligions that have fewer members, especially if those members are drawn from the margins of society, do not have sufficient influence over the legislative process to avoid being flailed by the dinosaur's tail of legislation of general applicability, legislation not motivated by any animus toward minor sects but merely insensitive to their interests--possibly even oblivious to their existence.

Sasnett, 91 F.3d at 1021. Resp. App. at A1. In enacting RFRA, Congress was giving the unfamiliar and the downtrodden a meaningful right to exercise their religion in the light of official ignorance or indifference. This was precisely analogous to Congress' efforts to give Hispanic and African-American citizens a meaningful right to vote, as approved in Morgan and many other cases. In enacting RFRA, Congress was eliminating the intent requirement to require compelling interest scrutiny for the lingering evil of discriminatory effects, as it has done in other instances, with the Court's assent.

RFRA does not direct the states to spend any money nor does it compel any particular state action. Sasnett, 91 F.3d at 1022. Pet. App. at A8. RFRA does not require absolute accommodation even to severe burdens on religious practices. State actions that are the least restrictive means of advancing compelling interests will withstand scrutiny. 42 U.S.C. §2000bb-1(b). This is the same test applied against non-neutral laws under the Free Exercise Clause. Church of the Lukumi, 113 S.Ct. at 2233. As demonstrated by Congress' understanding that courts should continue to show substantial deference to prison authorities, see, Mack v. O'Leary, 80 F.3d 1175, 1180 (7th Cir. 1996), interpretation of compelling interest scrutiny under RFRA need not be entirely ignorant of the context.

Finally, Petitioners assert that RFRA violates the Separation of Powers Doctrine. Though the petition is not clear, we believe that they are surmising that this Court in Smith declared its incompetence to identify substantial burdens on religion.[24] However, RFRA does not require any inquiry into religion that courts have not been conducting for years. While courts may not inquire into either the "truth" or the "orthodoxy" of a particular belief, United States v. Ballard, 322 U.S. 78, 87 (1944), they have properly inquired into "whether the beliefs professed . . . are sincerely held and whether they are, in the [claimant's] own scheme of things, religious." United States v. Seeger, 380 U.S. 163, 185 (1965). Because it is the free exercise of "religion" that is protected by the First Amendment, such inquiries are inescapable. Wisconsin v. Yoder, 406 U.S. 205, 216 (1972). This Court has had no trouble dismissing religious claims as bizarre or incredible. Frazee v. Ill. Dept. of

---

[24]RFRA does not, and does not purport to, redefine the Constitution.

Employment Security, 489 U.S. 829, 834 n. 2 (1989). The courts already consider burdens on religion in evaluating Title VII claims. RFRA requires no new inquiry.

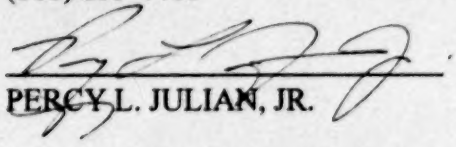
Both the Fifth Circuit in Flores, 73 F.3d at 1363, and the Seventh Circuit here, 91 F.3d at 1022, Pet. App. at A8, believed that the question of judicial competence did not render RFRA facially invalid. In doing so, they were relying on something at which Courts are very competent, the ability to interpret statutes according to the context. In this case, Christians were completely deprived of crosses. It is inconceivable that courts lack the competence to say that this is a substantial burden on the exercise of religion.[25]

CONCLUSION

For the reasons stated above the Respondents respectfully request that the Petition for Writ of Certiorari in this matter be denied.

Respectfully submitted,

*PERCY L. JULIAN, JR.
*Counsel of Record
STEVEN N. SCHULMAN
JULIAN & ASSOCIATES, S. C.
330 East Wilson Street
Madison, Wisconsin 53701-2206
(608) 255-6400



PERCY L. JULIAN, JR.

ATTORNEYS FOR RESPONDENTS

Dated: December 5, 1996

---

[25]Petitioners have never raised an Establishment Clause issue and never appealed the Tenth Amendment issue. Those issues are expressly not raised here. Pet. at 4 n.1. Should the Court strike down RFRA on either ground in Flores, relief for Petitioners on those grounds would be inappropriate.

APPENDIX

APPENDIX

TABLE OF CONTENTS

		Page
A.	Corrections of Errors in Petitioners' Transcript of Decision of Court of Appeals	A1-A2
B.	Constitutional Provisions Involved	A3
C.	Wisconsin Promulgated Regulations Involved	A4-A5
D.	Petitioners' New Internal Management Procedure Governing Possession and Wearing of Religious Emblems	A6-A10

A. CORRECTIONS OF ERRORS IN PETITIONERS' TRANSCRIPT OF DECISION OF COURT OF APPEALS

Respondents have discovered the following material errors in Petitioners' transcription of the Decision of the Court of Appeals. Words omitted from Petitioners' transcription are underlined.

The paragraph in Petitioners' Appendix commencing near the bottom of Page A6 and continuing to Petitioners' Page A7 should read:

> But we do not think that the scope of section 5 of the Fourteenth Amendment is limited to the strictly remedial aim evident in, for example, the ban on literacy tests. Rights are instruments for achieving concrete goals. The right to exercise one's religion free of government interference is an instrument for achieving the goal of religious freedom. That freedom is impaired by practices that do not, as well as by practices that do, infringe the constitutional right itself as it was authoritatively construed in the Smith case. Religions that have strong support among influential people have enough influence in the political process to be able to make sure that legislation is not passed that will inadvertently burden the observances required or encouraged by the religion. It is not an accident that we have Sunday closing laws rather than Thursday closing laws. Religions that have fewer members, especially if those members are drawn from the margins of society, do not have sufficient influence over the legislative process to avoid being flailed by the dinosaur's tail of legislation of general applicability, legislation not motivated by any animus toward minor sects but merely insensitive to their interests -- possibly even oblivious to their existence. The formal right of the members of these sects to the free exercise of their religion may have little practical value if observance is made onerous by general-purpose legislation. It seems to us that Congress can properly legislate under section 5 to make the formal right of religious freedom of persons who lack political power in individual states (yet are somehow able to form or benefit from the formation of an effective coalition to obtain legislative assistance at the national level) a meaningful right. The analogy to the empowerment theory of the Voting Rights Act (see, Katzenbach v. Morgan, supra., 384 U.S. at 652-653, 86 S.Ct. at 1724-1725) is close.

Prisoners, Christian or otherwise, are a good example of a group whose claims to be able to exercise a meaningful freedom of religion are unlikely to be heard in state legislatures.

See, Sasnett v. Sullivan, 91 F.3d 1018, 1021-1022 (7th Cir. 1996).

The full paragraph on Petitioners' Page A9 should read:

So the burden of justification is on the state; and it has not been carried. The regulation to which the defendants refuse to make an exception forbids the wearing of a crucifix even if it is too small or light to be a weapon (at least more of a weapon than a fist, a tooth, or a fingernail), too inexpensive to barter for a weapon, invisible because worn under clothing, and not a gang symbol or easily confused with one. The state allows prisoners to have rosaries, which could be used to strangle a fellow prisoner or a guard, and bans crucifixes even in correctional facilities wholly occupied by white-collar prisoners who do not belong to gangs or get into fights with each other or the guards. These features of the state's practice blast the case for regarding a ban on crucifixes and other religious jewelry as a serious and measured response to a concern with violence or a concern with gangs, legitimate and important as these concerns are. If particular types of religious jewelry (or religious jewelry of any type in the hands of prisoners reasonably believed prone to use it for purposes of weaponry, barter, or gang insignia) pose a genuine threat to prison security, the state can ban them; prison security is a compelling state interest. Id. at 1180.

See, Sasnett, 91 F.3d at 1022-1023.

B. CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment I, states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment XIV, states in pertinent part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> * * *
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Wisconsin Constitution, Article I, §18, states:

> The right of every person to worship Almighty God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend, erect or support any place of worship, or to maintain any ministry, without consent; nor shall any control of, or interference with, the rights of conscience be permitted, or any preference be given by law to any religious establishments or modes of worship; nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.

C. WISCONSIN PROMULGATED REGULATIONS INVOLVED

Wisconsin Administrative Code, §DOC 309.61, states in pertinent part:

> **DOC 309.61 Religious beliefs and practice. (1)** GENERAL PRINCIPLES. (a) The department may not discriminate against an inmate or an inmate group on the basis of the inmate's or group's religious beliefs. The department recognizes that religious beliefs can provide support to inmates which may aid in their adjustment to institutional life and can lead to development of community ties which may aid in the inmates' successful reintegration into the community upon release.
>
> (b) Inmates may pursue lawful religious practices required or encouraged by their respective religious which are consistent with their orderly confinement, the security of the institution and fiscal limitations.
>
> (c) The department may not require inmates to participate in religious activities and may not maintain information concerning an inmate's religious activities other than records required for administrative purposes.
>
> (d) To the extent feasible, institutions may make facilities and other resources available to inmates for religious practices permitted under sub. (2).
>
> **(2)** INMATE PARTICIPATION IN RELIGIOUS PRACTICES. (a) An inmate who wants to participate in religious practices that involve others or that affect the inmate's appearance or institution routines shall submit a written request to the superintendent for permission to participate in specific religious practices. The request shall include a statement that the inmate professes, or adheres to, a particular religion and shall specify the practices of the religion in which the inmate requests permission to participate.
>
> (b) Upon receipt of the request, the superintendent, with the assistance of the chaplain or designated staff person with appropriate religious training, shall determine if the request is motivated by religious beliefs.
>
> (c) In determining whether the request is motivated by religious beliefs, the superintendent may consider:

1. Whether there is literature stating religious principles that support the beliefs; and

2. Whether the beliefs are recognized by a group of persons who share common ethical, moral or intellectual views.

(d) In determining whether the request is motivated by religious beliefs, the superintendent may not consider:

1. The number of persons who participate in the practice;

2. The newness of the beliefs or practices;

3. The absence from the beliefs of a concept of a supreme being; or

4. The fact that the beliefs are unpopular.

(e) If the superintendent determines that the request is not motivated by religious beliefs, he or she shall deny the request.

(f) If the superintendent determines that the request is motivated by religious beliefs, he or she shall grant permission to participate in practices that are consistent with orderly confinement, the security of the institution and fiscal limitations.

(g) The superintendent shall establish guidelines consistent with this section to govern inmate participation in religious practices and the guidelines shall be posted in a conspicuous place or distributed to all inmates.

* * *

(6) SYMBOLS. Inmates may wear garments, religious medals and other symbols required by their religion, unless this interferes with the identification of inmates or the security of the institution.

D. PETITIONERS' NEW INTERNAL MANAGEMENT PROCEDURE GOVERNING POSSESSION AND WEARING OF RELIGIOUS EMBLEMS

[Text Follows]

INTERNAL MANAGEMENT PROCEDURES

State of Wisconsin

Department of Corrections
Division of Adult Institutions

PROCEDURE NUMBER: DOC 309, I.M.P. #6-K

ORIGINAL EFFECTIVE DATE: 5/15/96

NEW EFFECTIVE DATE:

SUPERSEDES NUMBER: DATED:

CROSS REFERENCE:
ADMINISTRATIVE RULE: DOC 309.35; DOC 309.61
OTHER: DOC 309, IMP #1, #1-D, IMP #6, #6-A through #6-J
ACA:

PAGE NUMBER: 1 OF 3

SUBJECT: RELIGIOUS EMBLEMS

1. **Purpose:**

In a recent federal district court decision, the court declared that the internal management procedure prohibiting the wearing of religious jewelry violated inmates' rights under the Religious Freedom Restoration Act and enjoined the Department from enforcing DOC 309, IMP #1-D (jewelry prohibition) with respect to inmates who can demonstrate a sincere religious motivation for wearing such jewelry.

In order to comply with the court's order and while the court decision is being appealed by the Department, the Administrator of the Division of Adult Institutions and the wardens have developed this IMP to regulate the acquisition, possession, use, and disposal of religious emblems by inmates within correctional institutions.

2. **Permitted Religious Emblems:**

A. Definition: "Religious emblem" means an object which functions as a religious symbol and which is generally recognized by the inmate's religion as having religious significance. "Religious emblem" does not include Native American medicine bags which are controlled under DOC 309, IMP #6-H. Native American medicine bags may be worn in accordance with section 3.B.1. of this IMP.

B. Inmates shall be permitted to possess one religious emblem that is a symbol of their religious preference.

C. A religious emblem may not exceed 1 and 1/8 inch in length by 1 and 1/8 in width by 1/8 inch in depth nor weigh more than 1/2 ounce. The emblem shall be single thickness. The emblem shall be a single unit which cannot be disassembled, except it may have a single link to which a necklace can be affixed. The emblem may not be made of glass. The emblem may be worn around an inmate's neck on a single strand necklace which is made of nonmetallic, approved material. The length of the necklace may not exceed 26 inches when measured from end to end. In addition, the necklace material shall not exceed 1/16 inch in diameter.

D The total cost of a religious emblem and necklace shall not exceed $10.00, excluding taxes and shipping costs.

BEST AVAIL

INTERNAL MANAGEMENT PROCEDURES

State of Wisconsin

Department of Corrections
Division of Adult Institutions

PROCEDURE NUMBER: DOC 309, I.M.P. #6-K

ORIGINAL EFFECTIVE DATE: 5/15/96

NEW EFFECTIVE DATE:

SUPERSEDES NUMBER: DATED:

CROSS REFERENCE:
ADMINISTRATIVE RULE: DOC 309.35; DOC 309.61
OTHER: DOC 309, IMP #1, #1-D, IMP #6, #6-A through #6-J
ACA:

PAGE NUMBER: 2 OF 3

SUBJECT: RELIGIOUS EMBLEMS

3. **Procedure:**

Acquisition, possession, use, display, and disposal of religious emblems shall be consistent with Chapters DOC 303, 306, 308, 309, 310 and 311, Wisconsin Administrative Code and Internal Management Procedures promulgated thereunder, unless otherwise provided in this IMP.

A. **Acquisition**

(1) Inmates who wish to acquire a religious emblem may make a request in writing, setting forth their religious preference, the emblem requested, the justification for the emblem, a possible source or vendor for the emblem, and its cost. The request shall be made by using the attached form (Request for Religious Emblem, DOC-1585). The completed form shall be submitted to the institution chaplain or the center superintendent.

(2) The warden/superintendent or designee shall review the request and approve or deny it. If the request is denied, the reasons for the denial shall be stated in writing.

(3) If the request is approved, the religious emblem may only be acquired through an approved vendor or recognized religious leader.

(4) Inmates may not make more than two requests per calendar year.

B. **Possession and Use**

(1) Inmates may only wear and display a religious emblem on a necklace around their necks over their chests while in their cells, rooms, or the area designated in dormitories, the institution chapel, or other area designated for group religious meetings. In addition, inmates may wear a religious emblem as prescribed above while in transit between their cells, rooms, or the area designated in dormitories and the chapel or other approved area. Inmates may not display a religious emblem while in transit.

(2) Inmates may not use or display a religious emblem as a symbol of an unauthorized inmate group.

ABLE COPY

INTERNAL MANAGEMENT PROCEDURES

State of Wisconsin

Department of Corrections
Division of Adult Institutions

PROCEDURE NUMBER: DOC 309, I.M.P. #6-K

ORIGINAL EFFECTIVE DATE: 5/15/96

NEW EFFECTIVE DATE:

SUPERSEDES NUMBER: DATED:

CROSS REFERENCE:
ADMINISTRATIVE RULE: DOC 309.35; DOC 309.61
OTHER: DOC 309, IMP #1, #1-D, IMP #6, #6-A through #6-J
ACA:

SUBJECT: RELIGIOUS EMBLEMS

(3) Possession of a religious emblem by an inmate is subject to standard consideration for safety and security. (For example: Inmates housed in a restrictive status with property limitations may have additional restrictions on the possession of religious emblems).

DEPARTMENT OF CORRECTIONS
Division of Adult Institutions
DOC-1585 (04/96)

WISCONSIN

REQUEST FOR RELIGIOUS EMBLEM

OFFENDER REQUEST - To be completed by the offender

OFFENDER NAME | DOC NUMBER | CELL / HOUSING UNIT

RELIGIOUS PREFERENCE

ITEM REQUESTED (Description)

JUSTIFICATION (Reason religious emblem is needed for practice of religion)

SOURCE OR VENDOR | COST

$

OFFENDER SIGNATURE | DATE SIGNED

DECISION - To be completed by institution staff

REQUEST APPROVED

☐ Yes ☐ No

IF DENIED, REASONS FOR DENIAL

AUTHORIZED SIGNATURE | DATE SIGNED

TITLE | INSTITUTION / CENTER

DISTRIBUTION: Original - Social Service File; Copy - Property; Copy - Chaplain; Copy - Security; Copy - Offender